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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~1028~~ 168

STATE TAX COMMISSION OF THE STATE OF ARIZONA, *Petitioner*

v.

THE MURRAY COMPANY OF TEXAS, INC., A CORPORATION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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STATE TAX COMMISSION OF THE STATE OF ARIZONA, *Petitioner*

v.

THE MURRAY COMPANY OF TEXAS, INC., A CORPORATION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

The State Tax Commission of the State of Arizona, your petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Arizona, entered in the above-entitled case on March 30, 1960, rehearing denied April 19, 1960.

OPINION OF THE COURT BELOW

The majority opinion and the dissenting opinion of the Supreme Court of the State of Arizona was filed and entered on March 30, 1960, in the above entitled case, numbered 6853 and is reported in 87 Ariz....., 350 P. 2d. 674 (Advance Pamphlet No. 4, April 29, 1960). A motion for rehearing was denied on April 19, 1960, and the mandate of the Supreme Court of Arizona to the lower court issued on April 27, 1960, which gave finality to the decision. A copy of the opinion rendered by the Arizona Supreme Court on March 30, 1960, and a copy of the denial of the Motion for Rehearing are included herein as Appendix I and II.

JURISDICTION

Petitioner asserts jurisdiction under Title 28, Section 1257,

United States Code and Rule 19 of this Court upon the grounds that the decision of the trial court and the majority opinion of the Supreme Court of Arizona determined that the imposition of the Arizona Transaction Privilege Tax, Sections 42-1301, et seq., Arizona Revised Statutes, upon respondent for sales of personal property made in Arizona, was prohibited by Article 1, Section 8 of the Constitution of the United States, as being a burden on interstate commerce.

The following cases sustain the jurisdiction of this court:

a. *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33

b. *McGoldrick* v. *Felt & Tarrant Mfg. Co.*, 309 U.S. 70

c. *Department of Treasury* v. *Wood Preserving Corporation*, 313 U.S. 62

HOW FEDERAL QUESTION IS RAISED

Respondent, on March 28, 1957, brought suit for Transaction Privilege Taxes which it had paid under protest, pursuant to Section 42-1339 of Arizona Revised Statutes. The sole question in the lower court was whether or not respondent's sales in the State of Arizona, upon which the transaction privilege taxes were levied, were immune from such taxation by reason of Article 1, Section 8 of the Constitution of the United States. This question was raised by respondent in the allegations of its complaint, paragraph V, and paragraph 3 of the Protest attached to said complaint. (See Appendix III). The judgment of the trial court, Maricopa County Superior Court, Phoenix, Arizona, entered December 23, 1958, was for respondent on precisely this basis, that the taxes levied were an unconstitutional burden on interstate commerce. (See Conclusion of Law No. 8 of said Judgment which is Appendix IV.) The case was appealed to the Arizona Supreme Court and the majority opinion was decided solely on the same grounds as the lower court's decision, that the tax levied upon the respondent's sales in question was an unconstitutional burden on interstate commerce. The dissenting opinion took precisely the op-

posite view, stating that Article 1, Section 8 of the United States Constitution did not bar the levy of the taxes in question because respondent had engaged in sufficient localized activities in the State of Arizona to sustain a levy of the tax.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Article 1, Section 8 of the United States Constitution:

> "The Congress shall have the power * * * to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

QUESTION PRESENTED FOR REVIEW

The precise question in this case is just how far can an out-of-state seller act beyond mere localized solicitation activities before the total picture of his localized activities constitutes a sufficient jurisdictional basis upon which the State of Arizona can levy its transaction privilege tax upon the sales involved, without such taxation being an unconstitutional burden on interstate commerce. The question which is presented, because of the fact situation involved, falls directly between the decisions of this Court in *McCleod* v. *J. E. Dilworth Co.*, 322 U.S. 327, and *Norton Co.* v. *Department of Revenue*, 340 U.S. 534, and there is no federal or state case directly in point or closely related thereto.

STATEMENT OF THE CASE

Respondent is a Delaware corporation engaged in the manufacture and sale of cotton gin machinery and steel buildings. Substantially, all its manufacturing activities are carried on in Texas and none in Arizona. Its home office is in Dallas, Texas and it has a branch office in Fresno, California. (A.R. 13).

Respondent has a full-time sales engineer, W. J. Simmons, who solicits all sales made by it in the State of Arizona. He either makes the sale himself or is involved in nearly every sale of respondent's products in this state. (A.R. 15, 65). He is paid on

the basis of all sales made by respondent in this state. (A.R. 65). All his orders, however, are accepted in either Fresno, California or Dallas, Texas. All credit processing is done there, and payments are made there also. All products are shipped to the customers F.O.B. Dallas. (A.R. 15). Respondent maintains a local office at the offices of Food Machinery & Chemical Corporation, Phoenix, Arizona, and here its representative meets customers, keeps files, dispenses technical assistance, and meets with and directs respondent's erector. Most of respondent's customers are aware of and make contact through this local office. (A.R. 47, 48, 50).

The respondent's erector, a Mr. May, is a full-time employee stationed in Arizona who is highly and specially trained in the operation and erection of cotton gins. He erects and assembles the cotton gins when received here, after being shipped in a knocked down condition. (A.R. 59, 68, 70). Most of his time is spent in such erection activities but he is available for and spends considerable time repairing and servicing respondent's products for its customers. Respondent's customers are aware this service exists in Arizona and make use of it. (A.R. 68, 70).

Respondent also maintains a stock of repair parts for its products at the same location where its sales engineer has his office, Food Machinery & Chemical Corporation, Phoenix, Arizona. (A.R. 14). This stock of parts is on consignment to that company and it handles all sales and collects Arizona Transaction Privilege Tax on all sales of such parts. The parts, however, belong to respondent. The fact that these repair parts are available locally is known to respondent's customers and a large number of repair parts are there sold. (A.R. 51, 52). For the right to carry such repair parts on consignment, Food Machinery makes available to respondent's sales representative the use of an office, telephone and office equipment. (A.R. 33). This arrangement is carried out in various Food Machinery & Chemical Corporation offices located in other states and thereby creates in each area so served a central-

ized location for respondent's customers to go for service of all their needs regarding respondent's products. (A.R. 33).

The audit period involved in this case was January 1, 1954, to September 30, 1956, and during this period respondent made sales to Arizona customers of $1,180,621.62 on which an Arizona Transaction Privilege Tax of 2% was paid on $442,864.48 or a total tax paid of $8,857.29. (A.R. 20). Arizona Transaction Privilege Taxes were not paid on sales of $737,757.14 made to Arizona customers. The only difference between the sales on which taxes were paid and those on which taxes were not paid was that in all cases in which respondent's customers paid to it an amount to cover the Arizona Transaction Privilege Tax in addition to the purchase price, respondent paid the taxes to petitioner. (A. R. 20). Respondent failed to remit the tax in all cases where its customers refused to pay the tax, or an additional amount to cover the tax. (A.R. 20).

On or about December 17, 1956, petitioner, by a deficiency assessment, levied on respondent for the $14,213.29 additional taxes which it claimed were due from the $737,757.14 of sales on which no tax was paid during the audit period. (A.R. 75, 76). Within the proper time, respondent applied for a hearing, protested, paid under protest, and then brought its action in the Maricopa County Superior Court, Phoenix, Arizona, to recover the tax thus paid. (A.R. 76).

REASONS FOR GRANTING THE WRIT

Petitioner contended in all previous phases of this action and contends here that respondent in selling its products in Arizona and by doing certain other work appurtenant thereto had engaged in sufficient localized activities within this state whereby the State of Arizona could lawfully tax all sales made or work done by respondent within its limits. Respondent claimed that all its sales were sales in interstate commerce, and all the work done was incident to sales in interstate commerce, and therefore the gross

receipts from said sales or work were exempt from such taxation by reason of Article 1, Section 8 of the Constitution of the United States. Further, respondent claims it did not engage in sufficient localized activities to remove these sales and work from the claimed exemption.

The sole question herein is whether or not respondent, by the amount of its localized activities carried on in Arizona, placed itself beyond the protection of the "Interstate Commerce Clause", Article 1, Section 8. It is readily seen, from the statement of facts, that respondent's activities are far beyond the itinerant drummer sales situation of *Robbins* v. *Shelby County*, 120 U.S. 489, or the solicitation only activities of the out-of-state seller involved in *McCleod* v. *Dilworth*, supra, wherein this court held that such solicitation activities alone did not remove sales from the protection of the "Interstate Commerce Clause". Here we have not only full time sales and technical assistance available to respondent's customers from its sales representative but there are numerous other local competitive activities which respondent has made available for its local customers. The first of these is a local office which is known to, used by customers and used as a meeting place by respondent's employees. (A.R. 47, 48). Secondly, there is located in the same building a local stock of repair parts for use in repair and service of respondent's products. (A.R. 14, 51, 52). Additionally, respondent, during the time of the audit, had one man employed as an erector and since that time has two men so employed for local work. (A.R. 59). These men are available not only for erection work, but when needed can apply their high degree of training and skill to customers repair and service problems. And they do spend a substantial amount on this work. (A.R. 68, 70). Certainly, these activities of supplying local sales and technical assistance, seeing to it that a stock of repair parts is also available locally, and having erection, repair and service personnel available locally, shows that respondent's activities go far beyond the itinerant "drummer's" activities or the activities of a local salesman merely soliciting orders.

Petitioner also strenuously urges that the total picture of respondent's activities which the customer sees is such that there is created in his mind the rightful impression that respondent, locally, can supply all competitive benefits that such a customer will receive when he deals with a local merchant. As said by Justice Udall, in his dissent to the Arizona Supreme Court's majority opinion:

> "I believe this reasoning utilizes an unwarranted premise as a basis for judgment; that in fact plaintiff's operations—hereinafter detailed—are as different from the old-style 'drummer's' modus operandi as daylight is from dark.
>
> "The proper yardstick to apply is: has plaintiff, as an out-of-state concern, by its overall operations in Arizona so localized its activities as to permit it to compete on an equal basis with local merchants? If it has then its sales are taxable in Arizona, otherwise not. Norton v. Department of Revenue (cited in mapority opinion); Hartman, State Taxation of Interstate Commerce, Dennis & Co. pp. 102, 103, 110. Furthermore, these activities, I believe, should be viewed from the position of the potential customer, i.e., can the buyer expect to receive the same service from plaintiff as he could from a local business selling cotton gins?"

Then Justice Udall examines minutely the solicitation activities, stock of repair parts, availability of erection, service and repair personnel and concludes:

> "It may well be that any one of these factors or activities taken separately would not justify Arizona imposing a tax, but it is the overall localized activities which must be considered in determining whether the facts are sufficient to predicate the tax. Norton case, supra. No two of these tax cases are the same and each must be judged upon its own peculiar facts. In my opinion the legal principles enunciated in the Norton case, and the Ensign case (75 Ariz. 220), are controlling here. Perhaps, because of the local outlet feature, the facts are stronger than in the instant case.
>
> "Nevertheless, I verily believe that plaintiff has by its over-

> all activities subjected itself to taxation in Arizona, even though it has very studiously tried to escape it. To rule otherwise is to allow plaintiff a competitive advantage and discriminate by taxation against his local competitor. The tendency of late has been for the U. S. Supreme Court to draw a finer balance between two conflicting philosophies, thereby permitting the States to force operators such as plaintiff to bear their fair share of the tax burden."

While petitioner contends such is the true factual situation involved, it must in all truth and honesty admit that the present factual situation does not present as large a scale of local operation as presented in *Norton Co.* v. *Department of Revenue*, supra, wherein Norton Co. had a complete retail branch and clerical division operating within the taxing state. Nor does it present the factual situation of *B. F. Goodrich* v. *State*, 38 Wash. 2d. 663, 231 P. 2d. 325, cert. denied, 342 U.S. 876, decided soon after the Norton decision, and relying upon it for its rule of law, wherein B. F. Goodrich had local operations consisting of large numbers of sales, clerical and administrative personnel employed within several divisions of B. F. Goodrich Co., almost all of which had local retail outlets. The B. F. Goodrich case had one very important difference, and this was that one of the types of sales taxed, Class A, Automotive, Aviation and Government Sales, concerned a sales division engaged solely in industrial sales. It had no retail outlet in the state. While treating the sales of this division separate from all other sales, still it was held taxable on the grounds that its sales, clerical and administrative office operation locally carried on in Washington, provided a sufficient nexus for the tax.

While there was no retail outlet involved in *Field Enterprises* v. *State*, 352 U.S. 806, affirming per curiam the Washington Supreme Court, in 47 Wash. 2d. 852, 289 P. 2d. 1010, still there was involved therein a large sales organization of hundreds of salesmen, which was held to be a sufficiently large localized activity upon which the court could decide that the impact of the interstate commerce clause had been overcome.

The present case, for which petitioner requests the granting of the writ of certiorari, presents a fact situation which falls between the decisions of this court in the aforementioned *McCleod* v. *Dilworth*, supra, case and the *Norton* and *Field Enterprises* cases. There is not a single federal or state decision which attempts to draw the line between these landmark cases. There is a great uncharted void of tax situations which falls squarely within this problem area. And with taxes always being a matter of prime consideration for every large operation of business, there are more and more of such businesses attempting to and succeeding in changing their mode of operations to fall within this questionable category. The importance of a decision determining rights within this void which will be applicable to all states engaged in sales taxation and which will set a uniform rule for all such states is obvious. That such a determination can only come from this Court goes without saying.

This court has in recent years followed a continuing trend of attempting to clarify taxing rights under the interstate commerce clause. *Western Livestock* v. *Bureau of Revenue*, 303 U.S. 250; *McGoldrick* v. *Berwind-White Coal Mining Co.*, supra; *International Harvester* v. *Department of Treasury*, 322 U.S. 340; *Norton* v. *Department of Revenue*, supra; *Northwestern States Portland Cement Co.* v. *State of Minnesota*, 358 U.S. 458; *Scripto Inc.* v. *Carson*, 362 U.S. 207. The trend of these cases can be best summed up in the often used words that "interstate commerce must pay its way". Our state courts have been following this trend and as recently as April 11, 1960, the Supreme Court of Michigan in *Armco Steel Corp.* v. *State of Michigan*, ...Mich....., 102 N.W. 2d 552, allowed a similar state tax against a claim of burden on interstate commerce.

The case which petitioner presents to this court can very properly be considered a situation which should be determined in order to properly continue the trend of the above cited cases. The Interstate Commerce Clause is not an absolute bar to state taxation

of interstate sellers. This court, in the above cited cases, has held over and over again that where there are sufficient localized activities engaged in within the taxing state, by the interstate seller, the taxing state has the right to treat the business conducted just like that of a local merchant as far as taxation is concerned. In view of the factual situation involved here, where respondent has acted in Arizona to have available every localized competitive activity necessary to meet local competitors in the competition for sales, petitioner feels it right and proper that a determination should be made that the respondent cannot use the Interstate Commerce Clause to shield itself from state taxation. Since respondent acts in every factual manner just like a local business, it is therefore constitutionally proper that the State of Arizona should be able to tax that operation on an equal basis with the local competition which it has so successfully imitated.

CONCLUSION

Petitioner's writ of certiorari should be granted because there is presently a great void in our law regarding the right to the protection from state taxation by reason of the Interstate Commerce Clause, where an interstate seller goes beyond mere solicitation activities in the taxing state, but does not go as far as to channel its business through a large local retail outlet or a large sales and administrative division. A determination of this situation is necessary for the interest and protection of the several states and businessmen engaged in local and interstate commerce. A granting of this writ and determination of this question by this Court is the only way this can be accomplished and, therefore, its importance cannot be over-emphasized.

Respectfully submitted,

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APPENDIX NO. I

IN THE SUPREME COURT OF THE STATE OF ARIZONA

STATE TAX COMMISSION OF THE STATE OF ARIZONA,
Appellant,
v.
THE MURRAY COMPANY OF TEXAS, INC., a corporation,
Appellee.

No. 6853

Appeal from Superior Court of Maricopa County
Honorable Charles C. Bernstein, Judge
Judgment Affirmed

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PHELPS, Justice.

This is an appeal by the State Tax Commission of the State of Arizona from a judgment against it in the sum of $14,213.29 paid by plaintiff-appellee under protest following an additional assessment against it by the Commission in the above amount as and for a transaction privilege tax as provided for under the provisions of A.R.S. § 42-1301, et seq. The parties will hereinafter be designated as plaintiff and the Commission.

The facts are that plaintiff is a Delaware corporation with its principal place of business located at Dallas, Texas, and a branch

office in Fresno, California. It is engaged in the manufacture of cotton gins and prefabricated steel buildings which it sells in many states, including Arizona, as well as in foreign countries. It consigns a stock of gin repair parts to Food Machinery & Chemical Corporation at Phoenix, Arizona. These repair parts are sold by Food Machinery to its customers in Arizona, and it pays to the Commission the transaction privilege tax incident to such sales. Plaintiff exercises no control over the sales of such parts. Food Machinery handles said parts on a commission basis and at intervals remits to plaintiff the wholesale price thereof.

Plaintiff has as its sales representative in Arizona one W. J. Simmons who resides in Phoenix, and reports to the Fresno branch office. He solicits orders for plaintiff's products from persons and firms in Arizona. All sales of cotton gins and steel buildings are made pursuant to orders given to Simmons by customers or sent directly by the customer to plaintiff at Fresno or Dallas office. Simmons transmits orders procured by him to the Fresno office which are forwarded by it to the Dallas office for acceptance. Delivery of the gin machinery and steel buildings to customers are made on cars or trucks at Dallas. Billings are made and payments received either by the Fresno or Dallas office.

The contract between plaintiff and purchaser provides that "Any sales or use tax payable at source, that is or may be made effective and applicable to the goods and machinery embraced in this contract, shall be added to the purchase price." Where the tax has been paid by the customer it has been remitted to the Commission. If the purchaser did not pay such tax none was paid to the Commission.

It further provides that plaintiff will provide an erector (an expert in assembling and installing gins) if desired by the customer. The gin is (necessarily) shipped to the gin site in a knocked down condition and is there assembled. The purchaser agrees to install and operate the gin according to printed instruc-

tions furnished by plaintiff. When requested, the assembly, installation and testing is supervised by an erector furnished by plaintiff. The purchaser pays for services of the erector. The cost of assembly and installation is insignificant in comparison to cost of the gin. But they are necessary to the use for which it was intended.

Practically the same provisions are incorporated in the contract for the sale of steel buildings. The purchaser furnishes all labor for its erection except a superintendent and a helper who are furnished by plaintiff. The concrete work, plumbing and electrical work are the sole responsibility of the purchaser. These buildings are (necessarily) shipped to customers knocked down. They are assembled in a short time at a small cost compared with cost of manufacturing. The assembling of these buildings, like the gins, is necessary to their use for which they were intended. The superintendent and helper do no work except that inherent in the task of assembling them.

During the period here involved Joe E. May, who resides in Arizona, performed the work incident to gin machinery if requested by purchaser to do so. May receives his pay and directions from the Fresno office and makes his reports to that office. He receives his pay check and other mail from Fresno at his home address. May also repairs gins when desired by the gin owner. Occasionally a call for May is placed at Food Machinery office and relayed to May or given to him personally if he comes in. May is furnished an automobile by the company for his use, but he furnishes his own hand tools used in assembling or repairing gins. Some time in 1957 one Richard Milligan was employed in the same capacity as May and now resides in Phoenix. He also works out of the Fresno office.

It is immediately apparent that the facts in this case are quite different from the facts either in the case of Arizona State Tax

Commission v. Ensign, 75 Ariz. 220, 254 P.2d 1029, or any of the other Arizona cases, or Norton Co. v. Department of Rev. 405 Ill. 314, 90 N. E. 2d 737, 340 U. S. 534, 71 S.Ct. 377, 95 L.Ed. 517.

It is the contention of counsel for the Commission however that the plaintiff had engaged in sufficient localized activities in this State to bring it within the rule enunciated in the Norton case, supra, and that this State may lawfully impose the privilege and transaction tax upon it under the provisions of A.R.S. § 42-1301, et seq. The stipulated facts are all set out above and the depositions of Messrs. Simmons and Jodis do not materially modify the facts extrinsically stipulated to be correct except that, in addition to being a salesman, Simmons testified he has engineering knowledge acquired through his employment of several years with plaintiff and that he keeps blueprints (of some kind presumably of gins). Also that he keeps a filing cabinet for his correspondence at the office of Food Machinery and sometimes, after visiting the gins and looking over the plant, he makes suggestions as to improvements in the installation then in use. This would appear to be a sales suggestion.

We perceive nothing of material benefit to plaintiff performed by Simmons different from what he might have performed as an ordinary salesman visiting the State periodically. We believe it to be indisputable that all sales of gins and steel buildings made pursuant to orders solicited by Simmons or sent by the customer direct to the Fresno office or to the Dallas office, accepted in Dallas, and machinery delivered to the customer on cars or trucks at Dallas, Texas, are interstate transactions.

The fact that it was necessary to ship both gins and houses knocked down and had to be assembled and installed at the site where it was to be used, and required experts to assemble and install them does not in itself convert it into an intrastate transaction. Nor does the fact that the contract of purchase provides that when

requested by the purchaser to do so the plaintiff will provide an expert to supervise the assembly and installation of the gins at purchaser's expense make it intrastate in character; neither does the fact that the expert was an employee of plaintiff and lived in Arizona make it intrastate. Until such machinery is assembled and installed it is incapable of application to the use for which it was manufactured. The work of assembling and installing and the cost thereof is of comparative insignificance to the cost of manufacturing it.

Under the contract of sale and purchase of steel buildings the purchaser is made solely responsible for the concrete work, including foundation, plumbing and electrical work, and furnishes all labor for the erection of the buildings, except a superintendent and one helper who are furnished by plaintiff. Like the gin machinery, the erection of the steel building as to time consumed and costs are minor items when compared with the cost of manufacturing them. . . .

Plaintiff's total sales of gins, steel buildings and repair parts in Arizona from January 1, 1954 to September 30, 1956, amounted to $1,180,621.62. The transaction and privilege tax was paid by plaintiff when the purchaser paid it but it was not paid otherwise. The amount paid under protest represents the amount of tax which the purchaser did not pay.

There is yet another fact to be taken into consideration before the issue here can be determined. Plaintiff consigned to Food Machinery & Chemical Corporation at Phoenix, Arizona, a stock of gin repair parts. Food Machinery as such consignee sells the parts on commission at its retail price and through its Riverside headquarters office pays the sales tax to the Arizona State Tax Commission, and periodically remits to plaintiff the wholesale price therefor. Plaintiff exercised no control over Food Machinery in its handling of its gin repair parts. The title to the repair parts sold by Food Machinery at all times remained in plaintiff until sold by Food Machinery.

We believe it to be the general law that a consignee of goods sold on consignment is the agent of the consignor, however, unless otherwise agreed, it is a limited agency only for the purpose of selling the merchandise furnished it on consignment, which is generally held to be insufficient to constitute doing business in the state by the consignor. Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P.2d 133; Yarbrough v. W. A. Gage & Co., 334 Mo. 1145, 70 S.W. 2d 1055; Falls Rubber Co. v. La Fon, 256 S.W. 577; Southwest General Electric Co. v. Nunn-Electric Co., 283 S.W. 781.

This fact therefore when taken into consideration with the other facts above-related we believe is insufficient to constitute a localization of its activities in the State of Arizona to the degree that we can say its sale of gins and steel buildings in the manner stated in the stipulation of fact, had the effect of transmuting what would otherwise be purely an interstate transaction into an intrastate transaction and subject it to the imposition of the privilege sales tax under the provisions of A.R.S. § 42-1301, et seq.

As we said in the outset this case possesses but little similarity to the Norton case, supra, and none whatsoever to the Ensign case, supra. The Norton case was actually operating a branch retail business in the State of Illinois by state permission and had thereby submitted itself to the taxing power of the state. The court said under such circumstances the burden devolved upon it to show that particular transactions were dissociated with the local business. This it had not done. Counsel using this as a premise undertakes to say that the burden is upon the Murray Company to make a like showing as to its sales of gins and steel buildings through Simmons or upon orders direct from their customers. If it were first shown that Murtay Company had submitted itself to the taxing powers of this state and likewise to its judicial processes then the burden would fall upon the taxpayer claiming immunity from such tax. Until it does the law imposes no such burden upon it. The court also said that by localizing its business in Illinois the

Norton Company had gained the advantages of a retail outlet in the state to keep close to the trade, to supply locally many items and take orders for others and to reduce freight costs to local consumers. The court then states:

> "* * * Although the concern does not, by engaging in business within the State, lose its right to do interstate business with tax immunity, [citing case] it cannot channel business through a local outlet to gain the advantage of a local business and also hold the immunities of an interstate business."

The court then held that orders sent directly to Worcester by the customer and shipped directly to the customer from Worcester were interstate in character.

It does not seem to be logical to say that the Murray Company occupies a similar position in Arizona to that occupied by the Norton Company in Illinois. In that state Norton Company had submitted itself not only to the excise tax law of that state by establishing a business there, but also to the civil process of the courts of that state to redress any wrong a customer may have suffered. Murray Company certainly has not subjected itself either to the excise tax or to the legal processes of state courts in Arizona. We said in Reed v. Real Detective Pub. Co., supra, in which the Detective Publishing Company was shipping and selling their publication to the Arizona dealer on consignment, over whom it exercised no control as in the instant case, that the publishing company was engaged in interstate commerce. True, this was before the Norton case but the latter case has in no sense modified it.

Considering all of the factual circumstances to which the parties have stipulated, they do not, in our opinion, put the plaintiff here in business in Arizona in any degree. They therefore are not subjected to the payment of our privilege sales tax.

This conclusion in nowise conflicts with the Ensign case, supra. Ensign and associates were engaged in business in Arizona, sell-

ing, servicing and installing deep well Turbine pumps in Arizona. They had a dealers agreement with Layne and Bowler of Los Angeles, a California corporation, whereby they were to handle only the Layne and Bowler pumps. Four-fifths of Ensign's business were sales made to Arizona users. This included installation. On these sales excise tax was paid. In that case Phelps Dodge Company at Bisbee, Arizona, ordered a pump from Ensign who forwarded the order to Layne and Bowler in Los Angeles for acceptance. They shipped the pump direct to Phelps Dodge Company, f.o.b. Los Angeles. Phelps Dodge Company paid Ensign for the pump on the terms he prescribed. Ensign later remitted to Layne and Bowler their sale price therefor. We held the taxing incident was engaging in business in Arizona and that the state could collect a tax on its gross proceeds of sale or gross income resulting from its business activities within the state. Ensign was doing business in the state and therefore was required to pay the excise tax provided by law for the privilege of engaging in business in the state measured by the gross income or gross proceeds of sales made by him. The Murray Company was not engaged in business in this state. We do not believe the case of B. F. Goodrich Co. v. State, 231 P. 2d 325, ...Wash....., changes the rule laid down in the Norton Company case, supra. The court in the Goodrich case quotes with approval the pronouncement in the Norton Company case to the effect that even where a foreign corporation engages in business in another state it does not lose its right to do interstate business with tax immunity. The court used the Norton Company case as its yardstick in determining both—what transactions were not taxable and those that were.

We have held more than once that findings of fact are unnecessary where the parties litigant have stipulated to the facts. Work v. United Globe Mine, 12 Ariz. 339, 100 Pac. 813; Gilliland v. Rodriquez, 77 Ariz. 163, 268 P.2d 334.

In view of the conclusion we have reached however the trial court's findings of fact and conclusions of law become immaterial.

Judgment affirmed.

M. T. PHELPS
Justice

CONCURRING:
FRED C. STRUCKMEYER, JR.
Chief Justice
J. MERCER JOHNSON
Justice
LAURENS L. HENDERSON
Judge of Superior Court

Note: Justice Charles C. Bernstein, being disqualified, the Honorable Laurens L. Henderson, Judge of Superior Court, Maricopa County, was called to sit in his stead and participate in the determination of this appeal.

UDALL, Justice (dissenting)

This case was tried in lower court upon an agreed statement of facts, hence there is no conflict of evidence to be resolved. Under such circumstances it is well settled that this Court is in nowise bound by the conclusions of law drawn by the trial court. I have a deep and abiding conviction that my brethren of the majority, in affirming the judgment of the lower court, are departing from sound principles of tax law to the serious detriment of all other taxpayers in the State.

In my opinion the Court is improperly throwing a mantle of local tax immunity over plaintiff's manifold operations in this State which is not deserved. The case is really being decided upon the basis that plaintiff's sales and the doing of certain work incident thereto, are in the same class—for taxation purposes—as the sales made by an itinerant drummer who solicits orders in a State which are sent directly to the out-of-state home office for acceptance and filling or delivery back to the buyer. Concededly as to such sales, the State of the buyer has no local grip on the seller. McLeod v. J. E. Dilworth Co., 322 U.S. 327 64, S.Ct. 1023, 88 L.Ed. 1304.

I believe this reasoning utilizes an unwarranted premise as a basis for judgment; that in fact plaintiff's operations—hereinafter detailed—are as different from the old-style "drummer's" modus operandi as daylight is from dark.

The proper yardstick to apply is: has plaintiff, as an out-of-state concern, by its overall operations in Arizona so localized its activities as to permit it to compete on an equal basis with local merchants? If it has then its sales are taxable in Arizona, otherwise not. Norton v. Department of Revenue (cited in majority opinion); Hartman, State Taxation of Interstate Commerce, Dennis & Co. pp. 102, 103, 110. Furthermore, these activities, I believe, should be viewed from the position of the potential customer, i.e., can the buyer expect to receive the same service from plaintiff as he could from a local business selling cotton gins?

Let us examine plaintiff's localized activities as shown by the record. Generally these may be grouped into solicitation, stock of repair parts availability of erection service and repair personnel. More specifically I point out:

1. Plaintiff has residing here a full time sales representative who is on salary and commission, and this man took part in nearly every sale made in the area.

2. Plaintiff maintains in this state a stock of repair parts for its gins. These parts are on consignment to Food Machinery and Chemical Corporation, who handle the sales, but they are the property of plaintiff.

3. For the right to handle these parts on consignment, Food Machinery provides plaintiff's sales representative with desk space, use of telephone, and a telephone listing. Plaintiff and its employees make full use of these facilities, meeting customers there, meeting there themselves and using it as a base of operations.

4. The sales representative had available locally at this office the

records, plans, and other material necessary for such technical and sales assistance as needed by its customers.

5. Plaintiff has resident here two highly trained and skilled "erectors" who—where called for by contract—erect, service, and repair the cotton gins sold.

It may well be that any one of these factors or activities taken separately would not justify Arizona imposing a tax, but it is the overall localized activities which must be considered in determining whether the facts are sufficient to predicate the tax. Norton case, supra. No two of these tax cases are the same and each must be judged upon its own peculiar facts. In my opinion the legal principles enunciated in the Norton case, and the Ensign case (75 Ariz. 220), are controlling here. Perhaps, because of the local outlet feature, the facts are stronger than in the instant case.

Nevertheless, I verily believe that plaintiff has by its overall activities subjected itself to taxation in Arizona, even though it has very studiously tried to escape it. To rule otherwise is to allow plaintiff a competitive advantage and discriminate by taxation against his local competitor. The tendency of late has been for the U. S. Supreme Court to draw a finer balance between two conflicting philosophies, thereby permitting the States to force operators such as plaintiff to bear their fair share of the tax burden.

Finally, it should be noted that plaintiff's total sales covered by the audit period of 2 years and 9 months amounted to $1,180,621.62. A tax of $8,857.29 was voluntarily paid on sales amounting to $442,864.48. Pray tell where is the difference between the localized sales on which the tax was paid, and the sales involved in this suit amounting to $737,757.14 upon which the State levied and collected a tax of $14,755.15? Factually it would appear that all the sales were either intrastate sales to begin with or, as I believe, the *localized activities* of plaintiff have removed them from the sacrosant status of interstate sales. Certainly there is not an iota of proof which shows the sales in question here to be one whit

different from those upon which the tax was paid. It is inconceivable that the tax is valid if it can be passed on to the purchaser but otherwise is invalid. This commingling strongly indicates tax liability.

In such an anomalous situation it becomes all the more important that the "overall activities" be most carefully scrutinized. B. F. Goodrich v. State (1951), 38 Wash. 2d 663, 231 P. 2d 325, 330, 331, certiorari denied 342 U.S. 876, 72 S. Ct. 167, 96 L.Ed. 659.

For all of the foregoing reasons I would sustain the tax levied by the Tax Commission and reverse the judgment of the lower court granting plaintiff tax immunity.

LEVI S. UDALL
Justice

APPENDIX NO. 11

Supreme Court

STATE OF ARIZONA

Phoenix

CHIEF JUSTICE
FRED C STRUCKMEYER, JR
JUSTICES
M T PHELPS
LEVI S UDALL
J MERCER JOHNSON
CHARLES C BERNSTEIN

SYLVIA HAWKINSON
CLERK
LUCILE BROOKS
DEPUTY CLERK

April 21, 1960

Mr. Wade Church
Attorney General
Capitol Building
Phoenix, Arizona

Re: No. 6853

STATE TAX COMMISSION OF THE STATE OF ARIZONA, Appellant,

v.

THE MURRAY COMPANY OF TEXAS INC., a corporation, Appellee.

Dear Sir:

The following action was taken by the Supreme Court on April 19, 1960, in the above-entitled cause:

"ORDER: Appellant's Motion for Rehearing DENIED, Justice Udall dissenting."

Yours truly,
SYLVIA HAWKINSON, Clerk
By L. Brooks,
Deputy Clerk

B

cc
Messrs. Evans, Kitchel & Jenckes
Attorneys at Law
363 North First Avenue
Phoenix, Arizona

APPENDIX NO. III

Respondent's Complaint, paragraph V, and also paragraph 3 of Exhibit "A" attached to said complaint which is the protest filed with the State Tax Commission of Arizona upon the payment of said taxes under protest.

Respondent's Complaint, paragraph V:

"For the reasons set forth in Exhibit 'A' defendant has collected illegally from the plaintiff the sum of $14,213.29."

Exhibit "A", attached to Complaint, paragraph 3.

"3. The purported assessment of additional taxes against said company in the amount of $14,213.29 is illegal, void and of no effect for the reasons as follows:

* * * *

(b) The aforesaid gross sales of company by which the Commission has attempted to measure the 2% retail tax resulted from sales made in interstate commerce which, under the provisions of the Constitution of the United States cannot be taxed by the State of Arizona.

(c) The Transaction Privilege Tax (Excise Revenue Act of 1935, as amended) by virtue of the express provisions of subdivision A.4 of Section 42-1321, A.R.S., does not apply to sales in interstate or foreign commerce when prohibited from being so taxed by the Constitution of the United States or the Constitution of this State.

* * * *

(f) The imposition of said additional assessment upon the company constitutes a burden upon interstate commerce contrary to and in violation of the provisions of the Constitution of the United States."

APPENDIX NO. IV

Conclusion of Law No. 8 of the Judgment of the Maricopa County Superior Court entered December 23, 1958:

> "8. The assessment by defendant of additional taxes upon plaintiff in the amount of $14,213.29 constitutes a burden upon interstate commerce contrary to and in violation of the provisions of the Constitution of the United States, is contrary to the express provisions of subdivision A.4 of Section 42-1321, A.R.S., is illegal and void."

LE COPY

No. [redacted] 168

In the Supreme Court of the United States

OCTOBER TERM, 1959

STATE TAX COMMISSION OF THE STATE OF ARIZONA,
PETITIONER,

vs.

THE MURRAY COMPANY OF TEXAS, INC., A CORPORATION,
RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 1028

STATE TAX COMMISSION OF THE STATE OF ARIZONA, PETITIONER,

vs.

THE MURRAY COMPANY OF TEXAS, INC., A CORPORATION, RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Murray Company of Texas, Inc., your respondent, prays that the petition for writ of certiorari to review the judgment of the Supreme Court of the State of Arizona, entered in the above-entitled case on March 30, 1960, be denied.

QUESTIONS PRESENTED FOR REVIEW

The Initial question before this Court is whether the Supreme Court of the United States has jurisdiction to review a decision by the Supreme Court of Arizona that a manufacturer had not engaged in business in the State of Arizona to a degree that would subject the manufacturer to the imposition of the Arizona Transaction Privilege Tax, Sections 42-1301 to 1347, Arizona Revised Statutes, which is an excise tax im-

posed on a vendor who exercises the privilege of engaging in business in Arizona.

If this Court determines that it does have jurisdiction, the question is whether this Court will grant certiorari to review a decision by the Supreme Court of Arizona which is adequately supported on non-federal ground.

A further question presented is whether this Court will grant certiorari to review hypothetical or abstract federal issues which were unnecessary to the decision of the Supreme Court of Arizona, where the determination of which would have no effect on the judgment as given by the Arizona Court.

STATEMENT OF THE CASE

Respondent specifically denies that portion of the statement of the case which appears on pages 2 and 3 of petitioners Petition for a Writ of Certiorari, entitled as "How Federal Question is Raised", on the grounds that petitioner's statements and conclusions therein are inaccurate and unsupported by both the facts of the case and the records of the opinions of the courts below.

Respondent begs the Court's indulgence in presenting another statement of facts; however, certain omissions and inaccuracies by petitioner prompt supplement and correction.

Respondent, on March 28, 1957, brought suit pursuant to Section 42-1339 of the Arizona Revised Statutes to recover Transaction Privilege Taxes paid under

protest. Several questions were raised in the trial court by the allegations of respondent's complaint, among which were allegations that respondent was not engaged in business in Arizona. (See Appendix I). The judgment of the trial court, Maricopa County Superior Court, Phoenix, Arizona, entered December 23, 1958, was for respondent based upon several grounds, the first of which was that respondent was not engaged in business in Arizona. (See Conclusions of Law of said Judgment in Appendix II). The case was appealed by petitioner to the Supreme Court of Arizona which affirmed the judgment of the trial court solely on the ground that respondent was not engaged in business in Arizona which would subject it to the Arizona Transaction Privilege Tax, and therefore respondent was not subject to the payment of such tax.

ARGUMENT

POINT A. *This Court is without jurisdiction to grant certiorari to review the judgment of a state court where the judgment of the state court was based upon the construction and application of a state statute without reference to or involvement of a federal question.*

The holding of the Supreme Court of Arizona was that, as a matter of local law, the Arizona Transaction Privilege Tax is an excise tax wherein the taxable event is engaging in business in Arizona. This construction is well founded in Arizona precedent, *Arizona State Tax Commission v. Garrett Corp.*, 79 Ariz. 389, 291 P. 2d 208 (1956), and is not questioned by petitioner. The construction of state laws is the exclusive responsibility of state courts, *Speiser v. Randall*, 357 U.S. 513 (1958), and the meaning and application of state laws

by a state supreme court is accepted by this Court. *Storaasli v. Minnesota*, 283 U.S. 57 (1931).

The Supreme Court of Arizona further held that, as a matter of the facts of the case, respondent was not engaged in business in Arizona within the meaning of the statute. Approximately one-half of the Arizona court's written opinion is devoted to a review of the facts presented by the case, and the holding of the court is based on a thorough consideration of these facts. This Court does not inquire whether there was error below in dealing with questions of fact. *Behn, Meyer & Co. v. Campbell & Go Tanco*, 205 U.S. 403 (1907); *Merchants Mutual Auto. Liability Ins. Co. v. Smart*, 267 U.S. 126 (1925). Where this Court has before it the findings of a trial court, authenticated by the state speaking through its highest court, this Court may reject such determination only if it can say that it was so without warrant, that is was a palpable invasion of Constitutional guarantees. *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287 (1941).

The necessary conclusion of the Supreme Court of Arizona was that respondent was not subject to the payment of the Arizona privilege tax, and accordingly judgment was affirmed for respondent. Pertinent language of the Arizona court is cited as authority:

> "The cases upholding collection of a privilege tax are largely based upon the fact of an established business in the state." *State Tax Commission v. Murray Co. of Texas, Inc.*, 87 Ariz. ....., 350 P. 2d 674 at 676 (1960).
>
> "We held (in prior cases construing the Arizona Transaction Privilege Tax) the taxing incident was

engaging in business in Arizona and that the state could collect a tax on its gross proceeds of sale or gross income resulting from its business activities within the state." *Id.* at 679 (parenthetical matter supplied).

"The Murray Company was not engaged in business in this state." *Id.*

"Murray Company certainly has not subjected itself either to the excise tax or to the legal process of state courts in Arizona." *Id.* at 678.

"Considering all of the factual circumstances to which the parties have stipulated, they do not, in our opinion, put the plaintiff here in business in Arizona in any degree. They therefore are not subject to the payment of our privilege sales tax." *Id.*

With obvious clarity, the Supreme Court of Arizona determined the controlling facts of this case and applied its local laws in founding its judgment. This application by a state of its local laws and the facts upon which it founded its judgment are controlling in the Supreme Court of the United States, *General Trading Co. v. State Tax Commission*, 322 U.S. 335 (1944), and the state decision is conclusive as to the construction and application of the state statute, *Senn v. Tile Layers Protective Union*, 301 U.S. 468 (1937), and is not subject to re-examination by this Court. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950). There being no pretense that the highest state court adopted its view of a non-federal question in order to evade an issue under the Federal Constitution, and the case having been decided upon grounds that have no relation to any federal question, this Court will accept the de-

cision of the state court, whether right or wrong. *Nickel v. Cole*, 256 U.S. 222 (1921).

The petition for Writ of Certiorari is framed on the federal issue of immunity from state taxation by reason of Article 1, Section 8 of the Constitution of the United States; accordingly, no other question will be considered. Rule 23, Supreme Court Rules.

The opinion of the Supreme Court of Arizona is entirely devoid of a decision on this federal question. Arguendo, the federal question was raised on the trial court level, and was contained in the Conclusions of Law of the trial court. However, as stated by the Supreme Court of the State of Arizona in disposing of these matters:

> "In view of the conclusion we have reached however the trial court's findings of fact and conclusions of law become immaterial." *State Tax Commission v. Murray Co. of Texas, Inc., supra* at 679.

Indeed, why should the Arizona Court concern itself with an issue of immunity from taxation when on the basis of the facts respondent was not a subject of taxation. This Court will not undertake to review what the court below did not decide. *Walters v. St. Louis*, 347 U. S. 231 (1954).

Petitioner erroniously injects the federal question into his petition. It assumes that respondent was held subject to the Arizona privilege tax, and that petitioner would have received judgment but for the court's holding that respondent had met the burden of showing the application of the tax would be an unconstitutional

burden on interstate commerce. The assumption is without merit. The Supreme Court of Arizona attempted to dispel petitioners belief that such a federal question was before the court by stating:

> "If it were *first* shown that Murray Company had submitted itself to the taxing power of the state and likewise to its judicial process *then* the burden would fall upon the taxpayer claiming immunity from such tax. Until it does, the law imposes no such burden upon it." *State Tax Commission v. Murry Co. of Texas, Inc., supra* at 678 (emphasis supplied).

Petitioner's injection into this case of a federal question in anticipation of respondent's defense, should respondent have been held as exercising the taxable privilege, does not make this suit one arising under the Constitution, and is not sufficient to give this Court jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co., supra.*

The Arizona court cited cases that have dealt with constitutional immunity of taxation, notably *Norton Co. v. Department of Rev.*, 340 U.S. 534 (1950). However, the citation and discussion was to point out that such cases were neither applicable nor controlling, for they were concerned with situations where the initial finding was that a doing of business in the state had subjected the litigant to the taxing power of the state, unlike this case before the Court. The Supreme Court of Arizona also utilized the terms "intrastate" and "interstate" during the course of its opinion. In view of the holding of the court, there can be no doubt but that these words were used by the court in examining the evidence to determine whether respondent was en-

gaged in business in the state of Arizona, and not whether respondent was clothed with constitutional immunity to shield it from an applicable state tax. Even though it conceivably may be surmised from quotations from a state court opinion that the court intended to rest its decision on the determination of a federal question, the jurisdiction of this Court cannot be founded upon surmise. *Lynch v. New York ex rel. Pierson*, 293 U.S. 52 (1934).

The United States Supreme Court has no jurisdiction to review a state court decision unless it appears affirmatively from the record not only that a federal question was presented, but that the state court decision of the federal question was necessary to a determination of the cause, or that a federal question was actually decided, or that judgment as rendered could not have been given without deciding it. *Durley v. Mayo*, 351 U.S. 277 (1956); *Southwestern Bell Telephone Co. v. Oklahoma*, 303 U.S. 206 (1937); *Lynch v. New York ex rel. Pierson, supra;* Title 28, Section 1257, United States Code; Rule 19, Supreme Court Rules. Respondent contends that the record in this case does not affirmatively show that any federal question was actually decided by the Supreme Court of Arizona or that such a decision was necessary to the judgment rendered. The policy against premature constitutional adjudication demands that any doubts in petitioner's burden of showing this Court's jurisdiction be resolved against jurisdiction. *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 (1948).

POINT B. *This Court will not grant certiorari to review a state court decision which is adequately supported on non-federal grounds.*

For purposes of this argument respondent will assume that it is affirmatively shown by the record that the judgment of the Supreme Court of Arizona of necessity involved the federal question of an unconstitutional burden on interstate commerce by taxation which would vest this Court with jurisdiction to grant certiorari.

The presence of an adequate state ground upon which to rest the decision of the Arizona court is present by the Arizona court's construction and application of the tax statutes as heretofore established by Argument Point A.

The rule is clear that the United States Supreme Court will not review a judgment of a state court which rests on adequate state grounds, *Hammerstein v. Superior Court of Cal.*, 340 U.S. 622 (1951); *Dixon v. Duffy*, 343 U.S. 33 (1951), otherwise known as adequate non-federal grounds. *Young v. Ragen*, 337 U.S. 235 (1949). This rule is applied even though it is not evident whether the federal issue has been passed upon, *Southwestern Bell Telephone Co. v. Oklahoma, supra*, or where a federal question was discussed, *Geo. O. Richardson Machinery Co. v. Scott*, 276 U.S. 128 (1928), or where the state court's opinion is ambigious, *Black v. Cutter Laboratories*, 351 U.S. 292 (1956), or where it does not appear upon which of two grounds, federal or state, the judgment was based. *Buck v. People of State of Cal.*, 343 U.S. 99 (1952). The decision of a state court that an action based upon a state statute could not be sustained according to the provisions of the statute is adequate to sustain the judgment of the state court without reference to a federal

question also decided by the court. *De Saussure v. Gaillard*, 127 U.S. 216 (1888). Only where the non-federal ground is unfounded can the state judgment be reviewed. *McCoy v. Shaw*, 277 U.S. 302 (1928). Mr. Chief Justice Hughes spoke for a unanimous court in *Lynch v. New York ex rel. Pierson*, *supra* at 54, in stating:

> "Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear on which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction."

Even assuming that there is ambiguity in the Arizona court's opinion, or that a federal issue was discussed, or passed upon, or was a ground of the court's opinion, this Court should not grant certiorari as the court's decision that respondent was not doing business in Arizona such as to come within the purview of the tax is an independent, non-federal ground sufficient in itself to sustain the judgment.

POINT C. *This Court will not grant certiorari to review an abstract or hypothetical question.*

Should this Court grant certiorari, and grant to petitioner the precise holding it desires, such determination would be of no practical result. The judiciary of Arizona would be apprised that under the facts of this case the Arizona Transaction Privilege Tax would not be an unconstitutional burden on commerce between the states. However, this knowledge would not affect the holding of the Arizona court that such privilege tax is not applicable to respondent under the facts of

this case, and that therefore respondent shall have judgment in its favor. This Court will not consider hypothetical or abstract questions from the determination of which no practical result can follow. *City of Cincinnati v. Vester*, 281 U.S. 439 (1930); *Pelham v. Rose*, 76 U.S. 103 (1869).

The Arizona Court was concerned with the issue of whether or not respondent was doing business in the state so as to be a proper subject of the tax. As respondent was held not to be doing business in the state, and thus not a subject of the tax, a determination of whether or not respondent would have been clothed with constitutional immunity under the commerce clause was unnecessary. This Court will not review a decision of a state court where the basis of the state court's decision makes a consideration of asserted federal questions unnecessary. *Williams v. Kaiser*, 323 U.S. 471 (1944).

CONCLUSION

Petitioners should be denied writ of certiorari because there is no federal issue involved in the matter which would substantiate the jurisdiction of this Court. If jurisdiction be determined by this Court, it is respectfully submitted that this Court should not lend its determination to hypothetical federal issues which are unnecessary to a decision and of no practical result.

Respectfully submitted:

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Of Counsel

APPENDIX NO. I

Respondent's Complaint, paragraph V:

"For the reasons set forth in Exhibit 'A' defendant has collected illegally from the plaintiff the sum of $14,213.29."

Exhibit "A", attached to Complaint, paragraph 3.

"3. The purported assessment of additional taxes against said company in the amount of $14,213.29 is illegal, void and of no effect for the reasons as follows:

(a) The gross sales of company upon which said additional assessment was attempted to be measured (namely, 2% of the gross proceeds of sales or gross income from the business of engaging or continuing within this state in the business of selling any tangible property whatsoever at retail) did not constitute the gross proceeds of sales or gross income of said company derived by it from engaging or continuing within this state in the business of selling any tangible personal property whatsoever at retail.

* * * *

(d) The aforesaid sales were not made or consummated by the company in the State of Arizona.

(e) All sales made by the company upon which the Commission attempts to measure said additional assessment were made to customers in the State of Arizona pursuant to contracts entered into in the State of Texas; said contracts provided for the sale of cotton ginning machinery and prefabricated steel buildings

and the delivery thereof in the State of Texas; during the period of said audit the company did not maintain an office in the State of Arizona, did not keep any books or records in the State of Arizona and did not receive payment on the aforesaid contracts in Arizona.

* * * *

(g) The company did not, in connection with the aforesaid sales to customers in Arizona, carry on any business activities in the State of Arizona which would permit the State of Arizona to impose a privilege tax upon such activities measured by gross sales. . . ."

APPENDIX NO. II

Conclusions of Law of the Judgment of the Maricopa County Superior Court, Phoenix, Arizona, entered December 23, 1958.

"Based upon the foregoing Findings of Fact the Court concludes as a matter of law:

1. During the period involved herein plaintiff did not engage in any local business activities in the State of Arizona which would subject it to a tax imposed upon the privilege of engaging in the business of selling tangible personal property at retail."